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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DOUGLAS M. WRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

Where a criminal defendant, such as the petitioner, was convicted in a second trial, there having been a hung jury and a mistrial declared in the first trial, does the decision of this Court in *Richardson v. United States,* 468 U.S.___, 82 L.Ed.2d 242, 104 S.Ct. 1030 (1984), abrogate his right to appellate review of the sufficiency of the evidence in his first trial; and if not, whether the ruling of the court below, relying on *Richardson,* that precluded such review to the petitioner, violated his Due Process rights.

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The petitioner, Douglas M. Wright, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals, entered in this proceeding on August 5, 1986.

OPINIONS BELOW

The Opinion of the District of Columbia Court of Appeals is not yet reported, and appears in the Appendix hereto. (App. 1a-16a).

Jurisdiction.

The judgment of the District of Columbia Court of Appeals was entered on August 5, 1986. This Court has jurisdiction to review the judgment by Writ of

Certiorari pursuant to 28 U.S.C. Section 1257, as amended by Pub. L.91-358, Title 1, Section 172(a)(1), 84 Stat. 590, July 29, 1970.

Constitutional and Statutory Provisions Involved.

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 11 of the District of Columbia Code, 1981 Ed., Section 721(a)(1) provides:

Section 11-721. Orders and judgments of the Supreme Court.

> (a) The District of Columbia Court of Appeals has jurisdiction of appeals from -
>
> (1) all final orders and judgments of the Superior Court of the District of Columbia;

STATEMENT OF THE CASE

In a six count indictment that was filed in the Superior Court for the District of Columbia, the

petitioner was charged with: First Degree Murder While Armed-Felony Murder (2 counts); Attempted Robbery While Armed (2 counts); Assault with Intent to Kill While Armed; and Carrying a Pistol Without a License. (*United States v. Douglas M. Wright*, Criminal No. F-6302-82) The offenses were all violations of the District of Columbia Code (1981 Ed.); and arose in an incident that occurred on October 14, 1982 in which Robert Bush was shot and killed during an attempted robbery.

At about 7:50 p.m. on October 14, 1982, Bush and a friend, Robert Triplett, were standing together at the corner of Martin Luther King Avenue and Talbert Street in Southeast, Washington, D.C. Two armed men came up from behind them; and announced that it was a "hold up." One of the perpetrators stood behind Bush, and, upon a quick hand moving effort by Bush, the man shot him. Bush was mortally wounded by a gunshot to the chest.

On October 23, 1982, the petitioner was arrested at his home on a warrant that charged him with First Degree Murder in the killing of Bush. Thereafter, the subject indictment was returned against him.

On November 9, 1983, the defendant was brought to trial. The trial ran to November 22, 1983, when the jury which had been deliberating since the morning of November 17, notified the trial court that it was unable to reach a verdict. The Court declared a mistrial. At a later status hearing, the case was reset for trial. The second trial began on February 8, 1984, and ended on February 15, 1984, with the jury returning a verdict of guilty on the five remaining counts of the indictment, (Count 5 of the original six count indictment, which charged assault with intent

to kill Sidney Tinney, a bystander, had been dismissed by the 'Court in the first trial at the conclusion of the Government's case for lack of evidence). On April 4, 1984 and April 26, 1984, the trial court imposed sentences on the 5 convicted counts which aggregated to a term of imprisonment of from 21 years to life. The defendant made a timely appeal to the District of Columbia Court of Appeals. The Court affirmed the conviction by judgment entered on August 5, 1986.

At both of the two trials the central issue was that of identification, that is, whether the Government established that the petitioner was one of the persons who participated in the offenses. To carry its burden of proof on this issue, the Government at the first trial presented the testimony of two persons (Mavis Belt and Robert Triplett) who had witnessed the event. A third witness called by the Government, Sidney Tinney, refused to testify. Though the Government presented other witnesses in its case-in-chief, there was no circumstantial or forensic evidence that established the identity of either of the persons who committed the offenses.

The defendant put on a defense in both trials. In the first trial, he called a witness to the event, Cheryl Jackson; and, another person, John McEachin, who was with the petitioner at another part of Southeast Washington at the time of the crimes. The petitioner also testified that he was elsewhere, not at the place of the crimes, when they occurred.

The Government witness Mavis Belt testified in the first trial that she was standing some distance away on Martin Luther King Avenue (across the street), talking to a friend. She heard a shot and looked in the direction from where it came. She saw two or

three men standing on the corner. One of the persons had a gun. He stepped to the corner and fired a couple of shots down Martin Luther King Avenue. She next saw two men running. She had seen a portion of the face of the man with the gun, only the right side and his ear. He was clean shaven. She described his clothing. The other person was tall and wore a trench coat. She had known the petitioner for about ten years. She knew him by sight and well enough to stop and have a conversation with him. She did not think that the man she saw with the gun was the petitioner. The reason she felt that way was because she knew him and it did not look like him. She knew him well enough to identify him.

Robert Triplett, a Government witness, testified at the first trial that while he was talking to Robert Bush on the corner of Martin Luther King Avenue and Talbert Street, two men approached. One of them came up behind Triplett, put something in his back and pushed him up against the building, face into the wall. He turned his head to the right to see what was going on with Mr. Bush, who was about five or six feet away. What he saw was the glance of a scuffle; and he heard a shot go off. The scuffle that he saw was Bush's hands moving around. Then he heard the shot. He saw a gun. He caught what he described as a glimpse or glance of the person's face who had the gun. When the shot went off, he heard the hollering of a person and the patter of feet, like running. The next thing he was able to see was two people getting into a car that was parked further up Talbert Street. The car drove away.

On December 6, 1982, Triplett met with Detective Bagley of the Police Department. Bagley showed him

a photograph of a lineup; and asked him if he recognized anyone from the shooting in the picture. Triplett testified that he looked at the picture for about 15-20 minutes and decided that there was someone who he recognized. The person was wearing shield number six (the petitioner). He identified the petitioner in Court as the person he saw with a pistol on October 14, 1982. At the time of the shooting, he said the petitioner was wearing a jacket, jeans and had a beard. He had never seen the petitioner before October 14, 1982, nor since then, before the trial.

Detective Bagley testified as a Government witness. He corroborated that Triplett had been shown the line up photograph on December 6, 1982, and said that Triplett called the petitioner's shield number after studying the photograph for three to four minutes. At the conclusion of the Government's case, the petitioner moved for judgment of acquittal as to all the counts against him on the grounds of insufficiency of the Government's evidence. It was pointed out that the only evidence that suggested that the petitioner committed the offenses was the identification of just one witness (Triplett), who admittedly had only a glimpse or glance of the gunman. The Court denied the motion. However, the Court did dismiss count 5 that charged the petitioner with assault with intent to kill Sidney Tinney.

The defense put on a case, which consisted largely of the testimony of the petitioner and a friend, John McEachin, that the two men were in another part of Southeast, Washington, some distance away from Martin Luther King Avenue and Talbert Street at the time of the killing of Robert Bush. The petitioner testified that he has never worn a beard because hair

did not grow on the side of his face. McEachin had known the petitioner for 25 years; and he could not remember seeing the petitioner with full facial hair. At the close of all the evidence the petitioners renewed his position for judgment of acquittal.[1] This motion was denied.

The Government's evidence in the second trial was very similar to that in the first trial, with several exceptions. Significantly, Triplett's testimony was the same as before, with the only variation being that by an experiment conducted with him by the prosecutor, he calculated that he looked toward the person with the gun for about seven seconds. He also included in his testimony that he had identified the petitioner at the first trial.

Sidney Tinney, who had been adjudged in contempt for refusing to testify in the first trial, was a government witness in the second trial. He testified about being on Martin Luther King Avenue about 25 or 30 feet from the corner of Talbert Street when the shooting took place. He heard two or three shots and turned to see what was happening. He saw the side of a man's face who was doing the shooting. He caught a quick glance. The man on trial (the petitioner) did not look like the man he saw that

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[1] The motion did not appear in the transcript of the trial proceedings that was ordered for use on appeal, nor did a notation of it appear in the docket entries on the file of the case. However, if no record is found of the motion, for purposes of appellate review and the standard to be employed, the situation is the same, under the District of Columbia law, as if the motion had been made. See *Washington v. United States*, 475 A.2d 1127, 1128-29 (D.C. 1984) and *Wheeler v. United States*, 494 A.2d 170, 171-72 (D.C. 1985).

night. With leave of court, the prosecutor was permitted to cross examine (ask leading questions of the witness) upon its announcement of surprise. In this process Tinney was confronted with his grand jury testimony in which he had said that "Douglas Wright walked up and shot Bobby Bush." He was also examined by the prosecutor about an interview he had with Detectives Bagley and Harris on October 23, 1982, in which he viewed an array of photographs and selected the petitioner's picture as the one who did the shooting. On cross-examination Tinney said the petitioner was not the person he saw shoot Bush. He explained that he had selected the petitioner's picture (at several identification proceedings) as favoring the person who did the shooting; and that now that he had seen the petitioner in court, he realized that he was not the man.[2]

When the Government rested its case the petitioner moved for judgment of acquittal, asserting insufficiency of the evidence. The court denied the motion.

The defendant again presented his alibi defense in the second trial through his own testimony and that of John McEachin. Additionally, he produced two

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[2] At the end of Tinney's testimony the court instructed the jury as to how it was to receive the prior inconsistent statements of the witness (not as substantive evidence, but only for consideration in evaluating the credibility of the witness). The government also adduced the testimony of the two detectives (Bagley and Harris) who had interviewed Tinney and shown him an array of photographs and the line-up pictures. The detectives testified about Tinney having selected the petitioner as the person who did the shooting and also testified about Tinney's statements of identification.

other persons[3] who were in his company when the crimes occurred, at the place away from where they happened. The petitioner also called as witnesses in his defense Mavis Belt (who was not a Government witness in the second trial), Cheryl Jackson and Roland White. All three of these were at the scene of the shooting when it happened and each of them testified that the petitioner was not there.[4]

At the close of the case the petitioner renewed his motion for judgment of acquittal, which was again denied.

In the appeal to the District of Columbia Court of Appeals from the conviction and sentence in the second trial, the petitioner raised as a point on appeal that: at the first trial, the court erred in failing to grant his motion of judgment of acquittal. (Br. p. 38) An argument was made in support of this point, which focused on the fact that the only evidence connecting the petitioner with the offenses was that of only one witness (Triplett), who admittedly had only a glance or glimpse of the person he claimed was the perpetrator. The thrust of the petitioner's argument was that upon consideration of all the evidence in the case, it was legally insufficient to justify its submission to

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[3] Albert Russel Harris and John Waldo.

[4] Detective Bagley was called as a defense witness and testified that at the petitioner's presentment on October 25, 1982, the court ordered the petitioner to stand in a Police Department line-up in this case. Bagley admitted that he and his partner (Detective Harris) were the investigating officers and it was their responsibility to summon witnesses in the case to view the line-up. The line-up was scheduled for November 24, 1982; neither Detective caused Mavis Belt, Triplett or Tinney to appear and view the line-up.

the jury. (Br. 38-456). The Court of Appeals refused to consider the point on appeal, holding that the decision in *Richardson v. United States,* 104 S.Ct. 3081 (1984) supported the conclusion that a defendant convicted in a second trial, following a hung jury in the first trial, has no legal basis to challenge his conviction on the grounds of insufficiency of the evidence in the first trial.

REASONS FOR GRANTING THE WRIT

The writ should be granted in this case so that the Court can settle the question whether the decision in *Richardson v. United States,* 468 U.S._____, 82 L.Ed.2d 242, 104 S.Ct. 1031 (1984), abrogated the long standing rule that the denial of a motion for acquittal for insufficiency of the evidence made in a criminal case, which ends in a mistrial on account of a hung jury, can be reviewed on appeal in the event there is a conviction in the second trial. Courts of Appeals, both federal and state, that have considered the question of the effect of *Richardson* on the rule have reached divergent results. There is no uniformity of opinion in either the federal or state judiciary. It is important to the administration of criminal justice that the question be clarified because of the implication of an important due process principle. The instant case presents the question involved in a factual setting that is typical of the cases that have spawned the differing decisions.

Whether viewed in relation to federal or state criminal proceedings, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In*

Re Winship, 397 U.S. 358, 364 (1970). "The relevant question," it was said in *Jackson v. Virginia,* 443 U.S. 307 (1979), "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id., 319. The statutory right to appellate review in criminal cases implies the opportunity to challenge the sufficiency of the prosecution's evidence in implementation of this due process guaranty. In the situation where a trial has ended in a hung jury, with a mistrial declared, the denial of a motion for acquittal for insufficiency of the evidence, it has universally been held (generally by dicta) that review of the motion "must await the (second) trial and its outcome." *Gilmore v. United States,* 264 F.2d 44, 47 (5 Cir.), cert. denied U.S. (1959)[5] This is so, because jurisdiction on appeal is ordinarily confined to "final

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[5] See also, *Northern v. United States,* 300 F.2d 131, 132-33 (6 Cir. 1962); *United States v. Kaufman,* 311 F.2d 695, 698-99 (2 Cir. 1963); *United States v. Young,* 544 F.2d 415, 416, 418 (9 Cir.), cert. denied, 431 U.S. 657 (1976), *United States v. Wilkinson,* 601 F.2d 791, 795 (5 Cir. 1979); *United States v. Bodey,* 607 F.2d 265, 267-68 (9 Cir. 1979); *United States v. Becton,* 632 F.2d 1294, 1296 (5 Cir.), cert. denied, 454 U.S. 837 (1981); *United States v. Rey,* 641 F.2d 222, 225, 226 f.n. 5 and text (5 Cir.) cert. denied, 554 U.S. 861 (1981); *United States v. Ellis,* 646 F.2d 132, 135-6 (4 Cir. 1981) (Murnaghan, C.J., concurring); *United States v. Richardson,* 702 F.2d 1079, 1081, 1082, 1083, 1084 (D.C. Cir. 1983) reversed in part, 468 U.S. ___, 82 L.Ed. 2d 242, 104 S.Ct. 1031 (1984); *United States v. Cooper,* 737 F.2d 91, 92 (11 Cir. 1984) *United States v. Gulledge,* 739 F.2d 582 F.2d 582 (11 Cir 1984); *State v. Servalli,* 189 Conn. 201, 455 A.2d 852, U.S. cert. dismissed, 461 U.S. 920 (1983); *Rafferty v. Ownes,* 82 A.D.2d 582, 442 N.Y.S.2d 571; *People v. Dann,* 100 A.D.2d 909, 474 A.2d 566 (1984)

decisions", e.g. 28 U.S.C.A. § 1291[6]; and in the context of a mistrial, the denial of a motion for judgment of acquittal does not meet the test of finality. *United States v. Young,* 544 F.2d 415, 516, cert. denied, 431 U.S. 657 (1976).[7] "Final judgment in a criminal case means sentence. The sentence is the judgment . . . in criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation . . . on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined' " *Berman v. United States,* 302 U.S. 211, 212-12 (1937).

The question that is raised in this case is whether the decision in *Richardson v. United States,* supra, abrogated the traditional rule that a criminal defendant whose first trial ended in a mistrial because of a hung jury and is convicted in a second trial, has

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[6] Appeal in the present case to the District of Columbia Court of Appeals was founded on D.C. Code (1981 Ed.) §11-721(a)(1), which provides that the Court has jurisdiction of appeals from "all final orders and judgments of the Superior Court of the District of Columbia."

[7] More often than not, the issue concerning appealability of the denial of a motion for acquittal in the mistrial context arises where the appeal is attempted to stop the second trial. The argument is advanced that Double Jeopardy principles prevent a retrial when the evidence in the first trial was insufficient. (See cases at ft. nt. 1, supra). These efforts, to appeal a non-final order, have been characterized as presenting a claim of insufficiency of evidence "in the guise of a double jeopardy claim" *State v. Servalli,* supra, 455 A.2d, 854. See *Becton v. United States,* 632 F.2d 1294 (5 Cir. 1980), cert. denied, 454 U.S. 837 (1981) ("Although in form the question presented [was] that of a denial of a motion asserting former jeopardy, in reality and substance the appellants [sought] review of their motions to acquit made at the first trial." Id. 1296)

the right to appellate review of the sufficiency of the evidence in his first trial. *Richardson,* as will be shown, is very clear in its several holding. The court's decision in *Richardson* does not say directly or implicitly that a criminal defendant in the petitioner's circumstances is precluded from raising a due process challenge to the sufficiency of the evidence in the first trial. Nevertheless, in the petitioner's case, the District of Columbia Court of Appeals interpreted *Richardson* to hold that he is so barred. This was error that should be reviewed by this court on account of the significance of the decision in the administration of criminal justice. If a right of constitutional magnitude is determined to be engulfed by an interpretation of this Court's pronouncement, it should be this Court that says so.

As noted, the holdings of this Court in *Richardson* are quite clear, and, to this observation can be added, the holdings have nothing whatsoever to say or do with the traditional rule of review of the sufficiency of evidence in the first trial, after conviction in a second one. Very simply, the court in *Richardson* held: 1) that after a mistrial is declared because of a hung jury, the defendant's contention that retrial would subject him to double jeopardy because evidence sufficient to convict him had not been presented, raised a colorable double jeopardy claim; 2) however, no valid double jeopardy claim can be asserted on those facts because the declaration of a mistrial, following a hung jury does not terminate the original jeopardy. The opinion in *Richardson,* concluded in this language:

> ". .we reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates

> the original jeopardy to which petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial. § 82 L.Ed.2d, 251 (footnote omitted)

On the basis of its interpretation of *Richardson*, the Court below concluded in the instant case that the petitioner, who was convicted in a second trial, following a hung jury and mistrial in the first trial, had no right to appellate review of the question of the sufficiency of the evidence in his first trial. Initially, the court reached this result solely from an analysis of *Richardson*. After summarizing the *Richardson* holding, the court said:

> "Accordingly, a lawfully retried defendant is no more constitutionally entitled to acquittal on the basis of the evidence at the first trial than the defendant would be entitled to acquittal on the basis of some error which had resulted in a lawfully declared mistrial and retrial. Slip Opinion, p.7.

In the next paragraph of its opinion, the court focused on the language in *Richardson* at 104 S.Ct. 3086, f.n. 5 that jeopardy does not terminate upon the declaration for the mistrial, i.e., "the second trial is merely a continuation of the first trial" Id., and concluded:

> "But, according to *Richardson,* the denial of that motion followed by a hung jury—keeping jeopardy alive—is enough to permit a constitutional resumption of the prosecution without an appellate-court lookback at the first trial, *either before or after retrial,* even though the trial court's denial of the motion for acquittal (if anyone had looked) may have been wrong." Id. [footnote omitted and emphasis supplied]

Toward the end of its remarks about how the holdings in *Richardson* justifies the conclusion that the petitioner is not entitled to appellate review of the sufficiency of the evidence in the first trial, the Court of Appeals correctly recognized that *Richardson* is bottomed upon, and reaches no farther than, double jeopardy considerations; and in apparent appreciation of the fact that the petitioner never asserted that his right to appellate review of the motion he made in the first trial was based on a double jeopardy claim, the court additionally relies upon a post-*Richardson* Seventh Circuit case to bolster its conclusion. In this regard, the court said:

> "In sum, "[r]egardless of the sufficiency of the evidence at [appeallant's] first trial, he has no valid double jeopardy claim to prevent his retrial" after a hung jury, id. at 3086 (footnote omitted), or, similarly, to challenge his conviction on that ground after a second trial. *United States v. Brack,* 747 F.2d 1142, 1148 (7th Cir. 1984), cert. denied, 105 S.Ct. 1193 (1985)." Id., p. 8.

In the next section of the opinion (B), the court undertakes a review of the law in the District of

Columbia (federal and local) concerning appellate review of a motion for judgment of acquittal on the grounds of insufficiency of evidence. Following this, the Court acknowledges the force of the petitioner's position that his right to review of the sufficiency question would have been unchallenged in a direct appeal if he had been convicted in the first trial; and that it is unfair and irrational to deprive him of that right because he is convicted in a second trial that he is compelled to undergo. The court meets this proposition by attributing to the petitioner (or one in his position) a claim to the right to appellate review of the denial of the motion *before* a conviction can be sustained at the second trial. Of course, the petitioner never claimed such a right, nor attempted to exercise it. But, having bestowed the claim on the petitioner, the Court proceeded to foreclose it on the ground that it "would compromise a right of the public—unfettered reprosecution after a hung jury-which the Supreme Court in *Richardson* manisfestly intended to confer." Id., 12 [footnote omitted].

The rationale in *Richardson* is offered by the Court of Appeals as the principal support for its conclusion that the petitioner's due process right to review has evaporated. According to the court, in the mistrial setting, the rule no longer exists that the "government must present sufficient evidence the first time to get a second chance." *United States v. Bodey,* 607 F.2d 265, 268 (9 Cir. 1979). Apart from the dictum in the cases listed in footnote 1, supra, that the motion can be reviewed after conviction in a second trial, there have been cases where, following conviction in a second trial, the defendant was indeed permitted to challenge the sufficiency of the evidence presented

at his first trial: *United States v. Wilkinson,* 601 F.2d 791 (5 Cir. 1979); *United States v. Bodey,* 607 F.2d 265 (9 Cir. 1979); *People v. Tingue,* 91 A.D.2d 166, 458 N.Y.S.2d 429 (1983).

Since *Richardson,* a disparate pattern has emerged regarding the treatment of appellate review of the denial of motion for judgment of acquittal on insufficiency grounds made in a first trial.

In *United States v. Reis,* 788 F.2d 54 (1 Cir. 1986), the court "assumed without deciding that [the appellant] may now, after being convicted at a second trial [the first trial resulted in a mistrial because of a hung jury], question the propriety of the denial of his motion [for acquittal] made following the first trial." 788 F.2d, 56-57.

In *United States v. Brack,* 747 F.2d 1142 (7 Cir. 1984), cert. denied 105 S.Ct. 1193 (1985) it was held, following a review of *Richardson,* that in a mistrial situation the denial of the defendants motion challenging the sufficiency of the Government's evidence in the first trial was not reviewable under double jeopardy principles. The court responded to the defendant's supplemental argument that appellate review of his sufficiency claim was necessary to protect his Due Process rights:

> "In his Supplemental Brief, defendant admits that he has no valid double jeopardy claim, but argues that appellate review of the sufficiency of the evidence at the first trial is necessary to protect his Due Process rights. The Due Process Clause provides that a criminal defendant may be convicted only upon proof beyond a reasonable doubt of

> every element of the crime with which he is charged. *Jackson v. Virginia,* 433 U.S. 307, 315, 99 S.Ct. 2781, 2786, 61 L.Ed.2d 560 (1979); *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). Thus, the protection of the Due Process Clause focuses on conviction, not retrial. Defendant was not convicted at his first trial, and therefore has no right to appellate review of the evidence presented at the trial under the Due Process Clause." 747 F.2d, 1148 [footnote omitted]

The court in *People v. Taylor,* 137 Ill.App.3d.148, 91 Ill.Dec. 824, 484 N.E.2d 383 (1985) reasoning from *Richardson,* and citing *Brack,* reached the same result ("[t]he sufficiency of the evidence at [the first] trial is of no concern after there has been a conviction in a second trial." 484 N.E.2d 385).

Before *Richardson* settled the issue, the reported cases show that there were repeated unsuccessful efforts by defendants, in the mistrial situation, to obtain review of the sufficiency of the evidence in their first trial, so as to thereby prevent a second trial. These efforts persisted despite the accumulated body of case law that held that jurisdiction to entertain the claim was lacking because of non-finality, even though they (the claims) were cloaked in double jeopardy arguments. In *Richardson,* the court put an end to the masquerade. In doing so, the court did not say, as it well could have, that even after conviction in a second trial, appellate review of the sufficiency claim was not available. The court did not pronounce this rule, thus, leaving intact the level of review that was had in *Cooper,* supra, *Bodey,* supra, and *Wilkinson,* supra.

Courts, which since *Richardson*, have concluded that an interpretation of its holdings allows for termination of the type of review in the *Cooper* line of cases, have read too much in *Richardson*. Because these interpretations depart from *Richardson* and generate conflicts in the judiciary, the court should grant certiorari in this case.

In *People v. Tingue*, 91 A.D.2d 166, 458 N.Y.S. 2d 429 (1983) the court had on appeal the defendant's conviction in a second trial, which eventuated because of a hung jury and a mistrial declared in the first trial. The sole issue on appeal was the sufficiency of the prosecution's evidence in the first trial. The evidence in the second trial was sufficient to support the conviction. Nevertheless, the court held that it was empowered to address the "novel question"; and justified doing so in the following words:

> "The argument in favor of such a review is persuasive. Why should the defendant be worse off because the first jury failed to agree than he would be if that jury had convicted. "The Double Jeopardy Clause forbids a second trail for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." (*Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1, supra.) Since we find that the prosecution failed to muster sufficient evidence in the first trial, we should not permit him to obtain a conviction on his second attempt. "458 N.Y.S.2d, 2130-31."

A later decision from another department of the same court, *People v. Dann*, 100 A.D.2d 909, 474

N.Y.S.2d 566 (1984), relying on *Tingue* and quoting extensively from the decision, handled the same question in an identical manner.

The reasons advanced in *Tingue* to review the evidence in the first trial for sufficiency, are compelling and determinative. The Double Jeopardy guaranty is not involved in the question of whether a review of the evidence in the first trial is permitted upon appeal of a conviction in the second trial. Except, that if upon review it is found that the defendant's sufficiency challenge should be sustained, then it is apparent that if the determination had been made earlier, the defendant should not have been put to the second trial, which in an abstract and theoretical sense was barred by the Double Jeopardy Clause. But, the Double Jeopardy violation, at that point, is academic. The defendant has already lost the "guarantee's protection" and has been "forced to run the gauntlet a second time before an appeal could be taken; even if [he] is acquitted, or, if convicted has his conviction ultimately reversed on Double Jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit" *Abney v. United States,* 431 U.S. 651, 662 (1977).

In all of the cases where an appeal is taken on "colorable" Double Jeopardy Grounds in an effort to avoid a trial (usually a second trial), and the court finds that jurisdiction to entertain the appeal is lacking because the order appealed from is not a final one (and does not fall within the "Collateral order" exception delineated in *Cohen v. Beneficial Loan Comp.* 337 U.S. 541, 545-47 (1949)), the promise is always there that in the event of a conviction, the

right to have the underlying question, the predicate for the double jeopardy claim, reviewed on appeal in the event of a conviction in the second trial, e.g., *Abney v. United States,* supra (sufficiency of the indictment: "the issue resolved adversely to petitioners in such that it may be reviewed effectively, and if necessary convicted if and when a final judgment results" Id., 663) *United States v. Mc Donald,* 435 U.S. 850 (speedy trial) *Tibbs v. Florida,* 457 U.S. 31 (1982) (weight of the evidence); *United States v. Hollywood Motor Car Co.,* 458 U.S. 263 (1982) (vindictive prosecution: relief must await post conviction proceedings" Id., 268) In reference to ruling that vindication of the underlying right must await an appeal from the conviction in the second trial the oft quoted language from *Cobbledick v. United States,* 309 U.S. 323, 325 (1940) has been noted: that "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." And that [t]he corrections of a trial court's rejection of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." Id, 325-326. The right to appellate review of the evidence to determine whether, after viewing it in the light most favorable to the government, any rational trial of fact could have found the essential element of identity beyond a reasonable doubt in the petitioner's case, is a vaunted right, assured by the Constitution. It is irrational to urge that it passed out of existence because the double jeopardy right to which it theoretically related is "colorable" and not appealable before final conviction.

CONCLUSION

The petitioner was convicted in the trial court in a second trial upon an indictment that charged him with murder and other related offenses arising from a robber attempt. In the first trial the jury could not agree upon a verdict and the court declared a mistrial and discharged the jury. In the first trial (as in the second) the critical issue was the identification of the defendant as one of the perpetrators of the offenses. The only evidence connecting him with the offenses was an identification of him by a witness who had only a glimpse or glance of the person whom he testified was the petitioner. In both trials the petitioner interposed an alibi defense. He moved for judgment of acquittal at the conclusion of the government's case and at the end of the case in the first trial. His motion was based on insufficiency of the evidence to support a conviction. At each point, the Court denied the motion. After his conviction in the second trial he appealed to the District of Columbia Court of Appeals. One of the principal issues raised in the appeal was the sufficiency of the evidence in the first trial. The Court of Appeals declined to consider the issue, holding *inter alia* that the decision in *Richardson v. United States,* 82 L.Ed.2d 242 (1984) precluded review of the question.

The court's refusal to consider the issue of insufficiency of evidence in the first trial transgressed the protection offered the petitioner by the Due Process Clause. Moreover, the court's analysis of *Richardson,* which led to its ruling, was erroneous. The court in *Richardson* said nothing that would have justified the Court of Appeals' ruling. The opinion of the Court of Appeals rested upon a mistaken interpretation of

Richardson. Other courts, federal and state, have fallen into the same error, while others have not, creating confusion and divergence in the manner in which justice is administered. The decision of the Court of Appeals abrogates significant constitutional protections. For all these reasons, this court should grant its writ of certiorari to review the decision of the District of Columbia Court of Appeals in this case.

Respectfully submitted,

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Counsel for the petitioner

APPENDIX

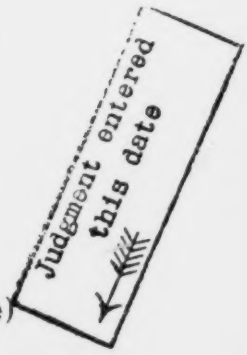
DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 84-516, -608

DOUGLAS M. WRIGHT, APPELLANT,

v.

UNITED STATES, APPELLEE.



Appeals from the Superior Court
of the District of Columbia

(Hon. Robert A. Shuker, Trial Judge)

(Argued February 5, 1986 Decided August 5, 1986)

Thomas Dyson, with whom *John A. Shorter, Jr.*, was on the brief, for appellant.

Mary Ellen Abrecht, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, and *Michael W. Farrell* and *Thomas J. Tourish, Jr.*, Assistant United States Attorneys, were on the brief, for appellee.

Before FERREN, BELSON, and STEADMAN, *Associate Judges.*

Opinion for the court by *Associate Judge* FERREN.

Concurring opinion by *Associate Judge* BELSON at p. 16.

FERREN, *Associate Judge*: Appellant's first trial resulted in a hung jury. After a second trial, the jury con-

victed appellant of two counts of first-degree, felony murder while armed, D.C. Code §§ 22-2401, -3202 (1981), two counts of attempted robbery while armed, *id.* §§ 22-2902, -3202, and one count of carrying a pistol without a license, *id.* § 22-3204. On appeal, he challenges the sufficiency of the evidence presented against him at the first trial. He also claims violation of his Sixth Amendment right to a speedy trial. As to the second trial, appellant contends the court erred in admitting police officers' testimony about an eyewitness's extrajudicial identifications. He also asserts the trial court erred in allowing the prosecutor to cross-examine a defense witness improperly. We affirm as to these allegations of error, but we remand to vacate one felony murder conviction and to reinstate, and impose sentence for, an attempted robbery-while-armed conviction vacated by the trial court.[1]

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[1] Appellant was convicted on two counts of felony murder for killing one person, Robert Bush. He received concurrent sentences of twenty years to life in prison for each count. The trial court accordingly concluded that the two convictions for attempted robbery while armed merged into those for felony murder. *Whalen v. United States*, 445 U.S. 684 (1980). Finally, the court sentenced appellant to one year in prison for carrying a pistol without a license, to be served consecutively to the sentences for murder.

We have stated that "where one killing is involved, and the government advances alternate theories of felony murder based upon more than one underlying felony, the accused may not be convicted of more than one felony murder." *Garris v. United States*, 465 A.2d 817, 823 (D.C. 1983) (underlying felonies of robbery and larceny). In the present case, the two underlying felonies were the separate attempted robberies while armed of Robert Bush and Robert Triplett. We therefore must remand (as the government acknowledges) for the trial court to vacate one felony murder conviction and to reinstate and impose sentence for the attempted robbery-

I.

According to the government's evidence at the second trial, Robert Bush was shot in the chest and killed while selling preludin pills at the corner of Martin Luther King Avenue and Talbert Street, S.E. between 7:00 and 8:00 p.m. on October 14, 1982. Bush and his common-law wife, Sharon Leach, had entered the area with ten pills, most of which she held, along with the money, at Hilda's Beauty Parlor located nearby.

Robert Triplett saw Bush, an acquaintance, on the corner. Bush gave Triplett some money for food; Triplett later returned with two boxes of chicken. As they stood at the corner talking and eating, two men came up behind them. One shoved Triplett, face-forward, against a wall, placed a hard object in his back, and went through his pockets. Bush stood two to three feet away from Triplett on his right. Triplett heard arguing and scuffling and then shots. Triplett turned his head and "caught a glimpse of the other person with the gun in his hand." He looked at him for about seven seconds, noticing his face, build, and clothes. Triplett claimed the lighting conditions were good. He identified appellant from a lineup photo and in court as the gunman he had seen scuffling with Bush that night.

Sometime during the afternoon or evening of October 14, 1982, Sidney Tinney heard shots from where he stood at Tony's Barber Shop, fifteen to twenty feet from the corner of Martin Luther King Avenue and Talbert. Tinney turned around and saw Bush, whom he had seen

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while-armed conviction which no longer is merged into the now-vacated felony murder conviction and does not underlie the felony murder conviction that remains. *See id.*; *Harling v. United States*, 460 A.2d 571, 573-74 (D.C. 1983).

on the corner before, "shoving someone"—the man Tinney thought he had seen doing the shooting. Initially, Tinney had seen the side of the gunman's face, but the gunman ran in Tinney's direction, firing the gun, and Tinney faced him directly. A bullet passed through Tinney's pant leg.

Although Tinney did not want to get involved, he eventually told a detective (and the grand jury) that appellant, whom he had picked out from an array of photographs, was the man who had shot Bush. Moreover, Tinney, as well as Triplett, identified appellant as the gunman from a photograph of a lineup. Tinney had refused to testify at the first trial. Facing contempt charges, he agreed to testify truthfully at the second trial if the government dropped the contempt case.

At trial, however, Tinney insisted that appellant did not look like the man he had seen with the gun after the shooting. The court accordingly permitted the prosecutor, who claimed surprise, to impeach Tinney with his prior identifications, including his grand jury testimony. The court also permitted the prosecutor to present testimony by two detectives who had witnessed Tinney's prior identifications of appellant. After Tinney's impeachment, as well as after both sides had rested, the court instructed the jury to consider Tinney's prior identifications only for the purpose of evaluating the truthfulness of Tinney's trial testimony, not for the purpose of "establishing the truth of any fact contained in that [prior] statement."

Appellant testified on his own behalf and denied the offenses. He said that on the day in question, he was at the Congress Park Shopping Center on Savannah Street, S.E., between 12th and 13th Streets from about 1:30 or 2:00 p.m. until around 8:00 p.m. Two defense witnesses confirmed that appellant had been at the shopping center

that day and that one of the witnesses had driven appellant home around 8:00 p.m.

Another defense witness, appellant's friend Mavis Belt, testified that she had been near the scene of the shooting and had seen the side of the gunman's face. Although she could not see him very well, she did not think the man looked like appellant because the gunman was younger and the side of his face had no hair.[2] Cheryl Jackson also testified for the defense, stating that she had seen two men running from the scene of the shooting but did not think either one was appellant, whom she knew. Jackson admitted, however, that both she and Mavis Belt had been drinking Colt 45 beer and Thunderbird wine before the shooting.

II.

Appellant challenges his convictions after the second trial on the ground that the court at his first trial, which ended in a hung jury, had erroneously denied his motion for judgment of acquittal.

A.

After *Burks v. United States*, 437 U.S. 1 (1978), several federal circuit courts of appeal entertained such a challenge, "rely[ing] upon or at least assum[ing] the existence of a double jeopardy ground for appeal." *United States v. Richardson*, 226 U.S. App. D.C. 342, 356, 702 F.2d 1079, 1093 (1983) (Scalia, J., dissenting),[3]

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[2] Appellant himself later testified, however, that he did not grow hair on the side of his face. Mavis Belt also noted that the gunman wore a baseball cap. She acknowledged that appellant usually wore such a cap.

[3] Judge Scalia cited *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); *United States v. Bodey*, 607 F.2d 265 (9th Cir. 1979); *United States v. Wilkinson*, 601 F.2d 791 (5th Cir. 1979).

rev'd, 104 S.Ct. 3081 (1984). *Burks* had held that the double jeopardy clause bars retrial after reversal of a conviction for insufficient evidence. Thus, some courts perceived that the Constitution accords no lesser right of review when the first trial ends, more favorably, in a hung jury and yet the defendant, as in *Burks*, faces a second prosecution. *See supra* note 3.[4]

Whatever logic there may be to this application of *Burks* and the double jeopardy clause, the Supreme Court has found it unpersuasive. In *Richardson v. United States*, 104 S.Ct. 3081 (1984), the Court held that a defendant who was to be retried after a mistrial attributable to a hung jury could not claim double jeopardy based on insufficiency of the evidence at the first trial.[5] The

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[4] Because the denial of a motion for judgment of acquittal is not an immediately appealable final order, the courts had not agreed on whether review of evidentiary sufficiency at the first trial could properly be invoked, before retrial, through an interlocutory appeal based on the collateral order doctrine, *United States v. McQuilkin*, 673 F.2d 681 (3d Cir. 1982); *see Abney v. United States*, 431 U.S. 651 (1977), or instead would have to await a final judgment of conviction after a later trial. *United States v. Ellis*, 646 F.2d 132 (4th Cir. 1981); *United States v. Becton*, 632 F.2d 1294 (5th Cir. 1980), *cert. denied*, 454 U.S. 837 (1981).

[5] In *Richardson v. United States*, 104 S. Ct. 3081 (1984), the Supreme Court addressed the question whether a defendant had the right to appellate review of the sufficiency of the evidence *before* retrial of a prosecution which had resulted in a hung jury. Citing *Abney*, *supra* note 4, the Court permitted interlocutory review but concluded, on the merits, that there was no double jeopardy bar to a retrial "[r]egardless of the sufficiency of the evidence at petitioner's first trial." *Richardson*, 104 S. Ct. at 3086. The Court's reasoning makes clear that a defendant whose first trial ends with a hung jury may never appeal on the ground of double jeopardy, whether before or after retrial. *See id.* at 3092-93 (Stevens, J., dis-

Court premised the decision on its line of cases, beginning with *United States v. Perez*, 22 U.S. 579 (1824), which holds a mistrial attributable to a "hung jury" is justified by "manifest necessity" and thus a retrial does not create double jeopardy. *Richardson*, 104 S.Ct. at 3085. The defendant is not twice put in jeopardy, very simply, because "the failure of the jury to reach a verdict is not an event which terminates jeopardy" any more than some other event warranting a mistrial terminates jeopardy. *Id.* at 3086. Accordingly, a lawfully retried defendant is no more constitutionally entitled to acquittal on the basis of the evidence at the first trial than the defendant would be entitled to acquital on the basis of some error which had resulted in a lawfully declared mistrial and retrial.

It follows that, in legal effect for double jeopardy purposes, the second trial is merely a continuation of the first trial. It is true, of course, that a defendant, upon motion, is entitled to a trial court ruling on evidentiary sufficiency at the end of the first trial, which may result in an acquittal terminating jeopardy before the jury gets the case. *Id.* at 3086 n.5. But, according to *Richardson*, the denial of that motion followed by a hung jury—keeping jeopardy alive—is enough to permit a constitutional resumption of the prosecution without an appellate-court lookback at the first trial, either before or after retrial, even though the trial court's denial of the motion for acquittal (if anyone had looked) may have been wrong.[6]

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senting). The Seventh Circuit, applying *Richardson*, recently confirmed this view, holding that after conviction at a second trial, "the sufficiency of the evidence at defendant's first trial is not reviewable under double jeopardy principles"; nor is the defendant entitled to such review as a matter of due process. *United States v. Brack*, 747 F.2d 1142, 1148 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1193 (1985).

[6] Theoretically, *Richardson's* implicit premise that for double jeopardy purposes a retrial after a hung jury is merely a

In contrast, the defendant in *Burks* was convicted, triggering an immediate right of appeal. Because the judgment was reversed for insufficient evidence—"the equivalent of an acquittal"—jeopardy was terminated, just as it would have been had the trial court itself granted the motion for acquittal. *Richardson*, 104 S.Ct. at 3085, 3086 n.5. Thus, no retrial was permissible. The crucial constitutional distinction for appellate review of evidentiary sufficiency, therefore, is termination of jeopardy, not completion of a trial.

In sum, "[r]egardless of the sufficiency of the evidence at [appellant's] first trial, he has no valid double jeopardy claim to prevent his retrial" after a hung jury, *id.* at 3086 (footnote omitted), or, similarly, to challenge his conviction on that ground after a second trial. *United States v. Brack*, 747 F.2d 1142, 1148 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 1193 (1985). According to *Richardson*, as a matter of double jeopardy law, the public's right to reprosecute after a hung jury is paramount to the defendant's right to review of a completely tried but unresolved indictment, even though the appellate court might have reversed for insufficient evidence at the first trial if the jury had convicted, as in *Burks*, instead of deadlocked, *see Richardson*, 104 S.Ct. at 3086, or if the

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continuation or resumption of the first trial means that, upon retrial, the government may reopen—and even amplify—its case, with the result that the first trial (as it turned out) was only a partial presentation of the evidence and the motion for judgment of acquittal at the end of the first trial (as it turned out) was therefore premature and irrelevant. As noted in the text, however, one problem with this theoretical formulation is that a defendant has the right to a trial court ruling on a motion for judgment of acquittal at the first trial —a right which, at the time, is obviously not premature and which, if granted, is dispositive. *See Richardson*, 104 S. Ct. at 3086 n.5.

defendant had been entitled to an interlocutory appeal of the trial court's denial of the motion for acquittal.

B.

Theoretically, however, the absence of a constitutional bar to a second trial after a hung jury does not necessarily preclude adoption of a judicial policy—in effect, a court rule—that would permit a defendant, before or after retrial, to test the sufficiency of the evidence on which the first jury could not find guilt. Such a rule would be derived from the fundamental notion that "the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his [or her] defense." *Cephus v. United States*, 117 U.S. App. D.C. 15, 17, 324 F.2d 893, 895 (1963). It would follow, the argument goes, that once the government has rested its case at the first trial, the defendant should be permitted to challenge the sufficiency at that point of the evidence of guilt, not only by motion but also, if necessary, by appellate review; otherwise, since there is no double jeopardy bar, the government would have an unfair opportunity to buttress, and perhaps save, a flawed prosecution.

For a long time in this jurisdiction, the federal circuit court of appeals was sympathetic to this kind of thinking. The court held, for example, that, even though a conviction would be sustainable if both the government's and the defendant's evidence were taken into account, the defendant, nonetheless, was entitled to acquittal if the government's evidence alone was insufficient. *Austin v. United States*, 127 U.S. App. D.C. 180, 189 & n. 20, 382 F.2d 129, 138 & n. 20 (1967); *Cephus*, 117 U.S. App. D.C. at 19, 324 F.2d at 897 (dicta); *but see Thompson v. United States*, 132 U.S. App. D.C. 38, 40, 405 F.2d 1106, 1108 (1968) ("evidence introduced by an accused in his [or her] own defense cannot give life to a 'dead horse,'

but it can invigorate a weak one"). Even though the defendant put on "evidence which ha[d] the incidental effect of filling the gap in the Government's case," *Cephus*, 117 U.S. App. D.C. at 18, 324 F.2d at 896, the defendant under the *Cephus-Austin* line of cases did not waive the right to test the sufficiency of the government's evidence alone.

However, in *Franey v. United States*, 382 A.2d 1019 (D.C. 1978), noting that *Cephus* and its progeny were not binding in the context there at hand, *id.* at 1021-22 nn. 4 & 5, this court rejected the circuit court's approach.[7] We held that a defendant "who introduces evidence after the denial of his [or her] motion for a judgment of acquittal made at the close of the government's case thereby waives that motion and cannot make the ruling the subject of appellate review." *Id.* at 1021 (citations omitted). Presumably in the interest of the whole truth, we concluded that appellate review of evidentiary sufficiency must consider both government and defense evidence.

Similarly, a few months ago in *United States v. Foster*, No. 83-1792 (U.S. App. D.C. Feb. 14, 1986) (en banc), the Court of Appeals for the District of Columbia Circuit overruled its own, *Cephus-Austin* approach. While carefully reserving some possible exceptions, that court, sitting en banc, announced the waiver rule we had applied in *Franey*. Writing for his colleagues, Judge Scalia was appropriately candid: the so-called "waiver" is not a "genuine" waiver; "it is a conventional fiction used to describe and produce the result that the courts will not blind themselves to incriminating evidence introduced by

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[7] *Compare Dumas* v. *United States*, 483 A.2d 301, 304 (D.C. 1984) (*Cephus* binding when co-defendant introduces testimony which damages appellant and fills gap in government's case against appellant).

the defendant who chooses to respond, rather than to demur, to the government's case." *Id.*, slip op. at 4-5 (citing *United States v. Belt*, 574 F.2d 1234, 1236-37 (5th Cir. 1978)).

In short, in all the courts of this jurisdiction now, a defendant whose motion for judgment of acquittal is denied at the end of the government's case, but who chooses to present a defense, usually must, if convicted, have his or her own evidence factored into the sufficiency analysis on appeal. This is so for two, related reasons: (1) because all evidence is germane to the truth, and (2) because the defendant is deemed to have subscribed to that truth-seeking premise by electing to put on evidence rather than to rely solely on contesting the government's evidence.

In contrast, however, a defendant whose motion for judgment of acquittal at the close of all the evidence is denied, but who achieves a hung jury, is not likely to be so enamored of truth-seeking that he or she would choose not only to put on evidence at the first trial but also to proceed to a second trial (permitted by *Richardson*) in lieu of testing the sufficiency of the evidence—both government and defense—at the first trial. The position of a defendant who faces reprosecution after a hung jury, therefore, is not one of choosing to go forward as in *Franey* and *Foster*. Rather, it is akin to that of the defendant who elects to challenge the sufficiency of the government's proof at the first trial by resting his or her case, rather than by putting on evidence that might "fill[] the gap in the Government's case." *Cephus*, 117 U.S. App. D.C. at 18, 324 F.2d at 896.

The defendant who receives a hung jury, therefore, asks only for the right to test the sufficiency of the evidence at the first trial, coupled with the same right of

appellate review (and potential for acquittal) that he or she would receive if the jury had been more impressed with the prosecution at the first trial and had convicted. This defendant stresses the inequity of granting the government a second chance to prevail in the one instance, but not in the other, when a review of the evidence would show that the government failed in its proof in both. This argument, derived by analogy to *Austin* and *Cephus*, has obvious force.

Nonetheless, we reject it. In *Richardson*, the Supreme Court has held, insofar as double jeopardy protection is concerned, that the government's right to reprosecute after a hung jury is paramount to a defendant's right to test the sufficiency of the evidence at the first trial by appealing the trial court's denial of a motion for judgment of acquittal. Although perhaps we could, as a matter of judicial policy, *cf. Austin*; *Cephus*, condition that right to reprosecute on the government's surviving a review of evidentiary sufficiency at the first trial, we conclude that such a limitation on the government would come too close to invoking double jeopardy principles, in derogation of *Richardson*, under the guise of an enhanced right to appellate review. Logic may dictate a defendant's right in every case to appellate review of the denial of a motion for acquittal at the first trial, before a conviction at a second trial can be sustained. But, if we were to take that approach, we would compromise a right of the public—unfettered reprosecution after a hung jury—which the Supreme Court in *Richardson* manifestly intended to confer.[8]

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[8] Nor is dismissal of this case warranted under *Barker v. Wingo*, 407 U.S. 514 (1972), for lack of a speedy trial. Appellant did assert his speedy trial right promptly and suffered prejudice from incarceration attributable to the instant charges. However, the length of delay between arrest and

III.

Appellant contends the trial court erred in admitting police officers' testimony about eyewitness Sidney Tinney's extrajudicial identifications. Tinney had picked appellant's picture from a group of individual photographs and also had identified appellant from a line-up photograph.[9]

At trial, however, Tinney surprised the prosecutor by claiming he had made a mistake. "[T]he man there on trial, that doesn't look like the man that I saw that night." The trial court therefore permitted the prosecutor to impeach Tinney with his prior identifications and also to call two detectives to testify about Tinney's extrajudicial identifications.[10]

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the first trial—two weeks more than one year—was barely enough for a presumptive speedy trial violation. *See Graves v. United States*, 490 A.2d 1086, 1091 (D.C. 1984) (en banc), *cert. denied*, 106 S. Ct. 814 (1986). Furthermore, the reasons for delay were, primarily, legitimate government investigative responsibilities coupled with typical delays attributable, for example, to a government-requested continuance and to appellant's own late-filed motions. Finally, there was no prejudicial anxiety of record or demonstrable prejudice to defense preparation. When we evaluate all the relevant factors on this record, we conclude there was no Sixth Amendment violation. *See Reese v. United States*, 467 A.2d 152, 159, 160 (D.C. 1983) (early and repeated assertion of right plus incarceration for eleven months between arrest and trial "weigh in favor" of speedy trial claim, but actual length of delay, neutral reasons for delay, and little evident prejudice "outweigh these concerns").

[9] Pursuant to an agreed-upon procedure, Tinney said "no" as Harris showed him a series of photographs but remained silent when appellant's photograph was displaced. Detective Bagley showed Tinney a line-up photograph, and Tinney chose the individual wearing shield number 6 (appellant).

[10] Defense counsel did not specifically object to the testimony of either Harris or Bagley relating to the facts sur-

Appellant now claims, for the first time on appeal, that the detectives' testimony was cumulative, highly prejudicial, and thus inadmissible under the "peculiar and special facts" of this case. Specifically, he asserts that testimony by persons who might otherwise be permitted to confirm prior identifications, *supra* note 10, should not be allowed when the witness, at trial, "retracts" the identification.

The government disagrees, emphasizing that the detectives testified for the sole purpose of impeaching Tinney's credibility, that the jury was so instructed, and that there was no prejudice warranting reversal.

We agree with the government and thus perceive no error, let alone plain error. In the first place, unlike *In re L.D.O.*, 400 A.2d 1055 (D.C. 1979), *Gibbs v. State*, 7 Md. App. 35, 253 A.2d 446 (1969), and other cases cited by appellant, the government's case did not depend only on Tinney's identification of appellant. Rather, the case rested on appellant's positive identification by Triplett, who adopted at trial his prior identifications and identified appellant again in court. The trial court properly recognized that Triplett's "one witness identification can go to the jury."

As appellant acknowledges, Tinney's prior identifications were not admitted for substantive purposes; they were not intended to corroborate Triplett. The government, rather, was attempting to use them to counter the

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rounding the identification; counsel objected, apparently on hearsay grounds, to their testimony about Tinney's statements. The trial court overruled the objection citing *Clemons v. United States*, 133 U.S. App. D.C. 27, 39-40, 408 F.2d 1230, 1242-43 (1968) (en banc), *cert. denied*, 394 U.S. 964 (1969). *Accord Jones v. United States*, 483 A.2d 1149, 1155-56 (D.C. 1984), *cert. denied*, 105 S. Ct. 2363 (1985).

impact of Tinney's surprise testimony that the man on trial did not look like the gunman. The court instructed the jury before the detectives testified, and again at the close of the case, that the jury was to consider all testimony relating to Tinney's extrajudicial identifications only for evaluating the credibility of Tinney's own testimony on the witness stand, not for the purpose of establishing the truth of any fact asserted in the prior statement. Under these circumstances, the trial court did not err in admitting the detectives' testimony for impeachment purposes and took appropriate steps to cure any prejudice to appellant from Tinney's impeachment.

IV.

Appellant also claims the trial court erred in permitting improper cross-examination of a defense witness, Roland White. Specifically, appellant objects to a then common cross-examination technique of confronting a witness with a recapitulation of the testimony of other witnesses that contradict his or her testimony, and then eliciting from the witness a conclusion that the other witnesses had lied or were mistaken. Appellant did not make this objection at trial, but, shortly thereafter, we explicitly condemned this type of cross-examination. *Carter v. United States*, 475 A.2d 1118, 1126 (D.C. 1984), *cert. denied*, 105 S. Ct. 2222 (1985).

Whatever our standard of review should be, harmless error or plain error, we conclude that any error here was not prejudicial and thus does not entitle appellant to a new trial. Roland White was an insignificant defense witness, and the matters about which he was improperly cross-examined were of no consequence. Appellant admits that the sole purpose served by White's testimony was to show that Bush and Triplett were associates and that Triplett had a full beard the day Bush was shot.

Both of these points were mentioned by other witnesses. The improper cross-examination related to other, virtually irrelevant questions: where White stood when the shots were fired and who spoke to White afterwards. White's testimony did not bear directly on the main issue in dispute: the identity of the gunman. The court twice instructed the jurors, moreover, that they were "the only judges of the believability of the witnesses." Appellant's case could not have been prejudiced by the improper cross-examination of White.

Affirmed; Remanded for resentencing.

Statement of *Associate Judge* BELSON: I concur in the result reached in section II, and otherwise join in the opinion. With respect to section II, I think it is enough to say that the outcome is controlled by *United States v. Richardson*, 104 S. Ct. 3081 (1984).